# *Multistate Tax Commission*

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December 13, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

**RE: Reply Comments of the Multistate Tax Commission, WT Docket No. 217**

Dear Ms. Salas:

Enclosed please find one original and 11 copies of the Reply Comments of the Multistate Tax Commission in the above-captioned matter. We would appreciate a stamped copy to be returned to us in the self addressed, stamped envelope provided.

Sincerely,

Roxanne Bland
Counsel
Multistate Tax Commission

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



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| In the Matter of | ) | |
| | ) | |
| Notice of Inquiry, | ) | WT Docket No. 99-217 |
| Cellular Telecommunications Industry | ) | |
| Association Petition for Rule Making and | ) | |
| Amendment of the Commission's Rules | ) | |
| To Preempt State and Local Imposition of | ) | |
| Discriminatory And/Or Excessive Taxes | ) | |
| And Assessments | ) | |
| | ) | |

**Reply Comments of the Multistate Tax Commission**

The Multistate Tax Commission (MTC), the administrative agency of the Multistate Tax Compact, submits these Reply Comments in response to Comments filed by various telecommunications providers at the invitation of the Federal Communications Commission (FCC), Notice Of Inquiry in WT Docket No. 217, and Third Further Notice of Inquiry in WT Docket No. 217, released on July 7, 1999.

The Compact is an interstate agreement adopted by twenty-one States through State legislative action. The Compact was developed to preserve the qualified sovereignty of the States to impose taxes with respect to interstate and international commerce, which the U.S. Supreme Court has indicated should pay its just share of the cost of State government. Twenty additional States have ratified the goals of the Compact by joining as associate or sovereignty member States. Another three States have subscribed to various programs of the MTC.[1]

The July 7, 1999 Notice of Inquiry requested comments from the private and public sectors regarding four topics: 1) the promotion of competitive networks in local telecommunications; 2) Wireless Communications Association International, Inc. Petition for Rulemaking to Amend § 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; 3) Cellular Telecommunications Industry Association Petition for Rulemaking and Amendment of the Commission's Rules to Preempt State and Local

[1] The current Compact members are: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington.

Imposition of Discriminatory and/or Excessive Taxes and Assessments; and 4) implementation of the local competition provisions in the Telecommunications Act of 1996.

The Reply Comments submitted by the MTC concern only the CTIA Petition and the imposition of allegedly discriminatory or excessive taxes on telecommunications providers by state and local governments. Specifically, the FCC has asked that interested parties submit instances of discriminatory taxation practiced against telecommunications providers. The FCC acknowledged in the NOI that § 601(c)(2) (the state tax savings provision) of the Telecommunications Reform Act of 1996 "limits" its power to preempt state and local tax laws, cautioning that whether to exercise this "limited" authority or not must be balanced with the needs of the telecommunications industry.

There are a number of state and local taxes that cause the industry concern. Industry complains that because it is subject to many more types of taxes than other businesses, the filing burden placed on the industry is nearly impossible to contend with. Industry further expresses concern that its property is valued differently, or taxed at different rates than other businesses. The industry asserts that many States do not allow providers to take advantage of the manufacturer's exemption on the purchase of equipment. It expresses concern also that income tax apportionment formulae unfairly require some providers to pay more in tax than competitors because of differences in the amount of property, payroll and sales in the taxing State. Further, the industry complains that States do not permit telecommunications providers to take advantage of tax credits, incentives and other subsidies that are made available to other kinds of businesses that a State may wish to attract. The wireless telecommunications industry, in particular, complains that it is impossible for them to track the progress of each call through the many possible jurisdictions through which a user may travel, and remit the appropriate tax to each jurisdiction.

## I. Neither the 1934 Telecommunications Act Nor the 1996 Telecommunications Reform Act Grants the FCC Jurisdiction or Preemptive Authority Over State and Local Tax Law

Many private sector commentators expressed their approval and relief that the FCC is taking up the issue of such taxation, and that it should use its regulatory authority under §253 to preempt state and local telecommunications and other taxes imposed on the industry (see, e.g., Comments of Triton PCS Holdings, Inc.). The commentators reason that these taxes, because of their discriminatory nature, act as "barriers to entry" for new telecommunications competitors into the existing market. Other commentators opined that §253 does not so much confer FCC jurisdiction over state and local tax laws as it merely does not expand its jurisdiction, a notion that presumes that FCC jurisdiction exists in the first instance (Comments of Airtouch Communications, Inc.).

A. The MTC submits that the FCC does not now, nor has it ever had jurisdiction to exercise preemptive power over state and local tax laws, whether under the authority of the Communications Act of 1934 or the Telecommunications Reform Act of 1996. While the MTC acknowledges that Congress, under its plenary power to regulate interstate commerce, can preempt State tax laws, that power is exercised with extreme caution so as not to upset the delicate balance of power between the state and federal governments that is the hallmark of our federalist form of government. So that such preemptions do not occur inadvertently, the U.S. Supreme Court developed the "clear statement rule", which mandates that federal statutory law will not be presumed to preempt an otherwise lawful state tax or taxing power unless the Congress articulates its clear intent to do so, *Seminole Tribe of Florida v. Florida*, 517 U.S. 133 (1996). Moreover, if the "clear statement" rule applies to Congress—the political guarantors of federalism—and the laws it enacts, then it also applies to any statute that purports to delegate congressional authority to a federal agency, such as the FCC.

The '34 Act, to which the '96 Act is an adjunct and amendment, created the FCC and specified its powers with respect to the national regulation of telecommunications and the telecommunications industry. Nowhere in the '34 Act does there appear a clear statement of congressional intent to preempt or otherwise limit state tax authority over telecommunications or telecommunications providers. Moreover, there is no clear statement of congressional intent to grant such jurisdiction and preemptive power to the FCC. The lack of a clear statement to preempt state and local tax law in the '34 Act necessarily means Congress did not intend to preempt such laws, and therefore did not intend for the FCC to have that authority also. The lack of a clear statement of intent in the '34 Act is significant—it means that there exists no preemptive authority granted by Congress to the FCC that could be affected—positively or negatively—by TRA '96.

On the contrary, Congress included § 601(c)(2), the state tax savings provision, in TRA '96 at the behest of the States in order to prevent the FCC from assuming jurisdiction to review and possibly preempt state and local tax law resulting from the reform of the '34 Act. The legislative history of TRA '96 confirms that it was not intended to affect state and local tax laws, U.S. Code Cong. Admin. News, 104th Cong. 2d Sess. Vol 4, pp. 211-212. Such action by Congress—enacting an amendment to the '34 Act and then prohibiting FCC oversight over implementation and operation of the amendment—is not without precedent. In 1984, Congress, responding to the growing regulatory confusion between federal, state and local governments over the cable industry and the abusive practices of cable companies, passed the Cable Communications Policy Act of 1984, P. L. 98-549, 98 Stat. 2780.[2] Section 622 of the Act, (47 U.S.C. § 542), limits the amount of franchise fees charged by a local jurisdiction to a cable company to 5% of the cable

[2] Prior to the passage of the Act, regulation of the cable industry was haphazard (one could also assert the industry was not regulated at all). The FCC had no grant of authority from Congress to regulate the cable industry, but merely assumed jurisdiction based on its regulatory authority over communications broadcasters. State and local authorities justified their regulatory authority by virtue of either the use of rights of way, or the cable company's designation as a public utility under State law.

operator's gross revenues in a 12-month period (47 U.S.C. § 542(b)). Prior to the 1984 Act, the FCC acted to set the franchise rate at 3%. State and local jurisdictions administering the fee objected to the FCC's action, contending that because cable operators used rights of way granted by the jurisdiction in which services were provided, the granting jurisdiction ought to have control over any fees charged.[3] In limiting the franchise fee to 5%, Congress also suspended the authority of "[a]ny Federal agency"...[to] regulate the amount of the franchise fees paid by a cable operator..." (47 U.S.C. § 542(i). The legislative history of this section states unequivocally that "[t]he FCC is stripped of the authority to limit by regulation the level of [the 5% franchise fee collect by a local jurisdiction] this fee...", U.S. Code Cong. Admin. News, 98th Cong. 2d Sess., Vol 5, p. 4663.

Moreover, basic, standard principles of statutory construction show TRA '96 is unambiguous that Congress did not intend to preempt state and local tax law. Section 1(b) of TRA '96 states that "except as expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934" (citation omitted). The state tax savings provision, § 601(c) states

> (c) Federal, State, and Local Law.—
>
> (1) No Implied Effect.—This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly so provided in such Act or amendments.
> (2) State Tax Savings Provision.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, supersede, or authorize the modification, impairment, or supersecession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

When §1(b) is read in conjunction with §601(c), it becomes clear that not only did Congress not intend to preempt state and local tax law in TRA '96, it did not purport to do so in the '34 Act. Section 1(b) of TRA '96, applied to the relevant phrase appearing in §601(c)(2), "nothing in this Act or the amendments made by this Act..." reveals that the first part of the phrase ("nothing in this Act') refers to TRA '96, and the second part of the phrase ("or the amendments made by this Act") refers to the '34 Act, because the phrase really reads "or the amendments made [to the '34 Act]"... The result is that neither TRA '96 itself, or any amendments it made to the '34 Act, should be interpreted to have any effect on state and local tax law. Therefore, the FCC never had preemptive authority over state and local tax laws from the time when the '34 Act was initially passed. The notion

[3] In any event, cities and localities often ignored the FCC cap, asserting that 3% of gross revenues did not adequately compensate them for their costs in permitting the use of local rights of way.

that the state tax savings provision of TRA '96 merely confirmed what limited preemptive power the FCC may have is simply misguided.

This is not to say, necessarily, that Congress could not have provided for such preemptive authority. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). As a general matter, the U.S. Supreme Court has said that Congress may provide, using its Commerce Clause powers, a federal agency the authority to preempt state or local laws, *Garcia*, p. 547.[4] Overturning prior precedent, the *Garcia* Court ruled that there are no "sacred province[s] of state autonomy" and that the federal political process is effective enough to protect State governmental interests from encroachment, *Garcia*, p. 554. Any restraints on congressional commerce clause power can be exercised through state participation in federal government action, which ensures that laws unduly burdening the States will not be promulgated, *id.*, p. 555.

That is precisely what occurred in the context of TRA '96. Perceiving that TRA '96 could have a substantive impact on state taxing authority, the States engaged in the federal political process to protect its tax sovereignty from federal interference. Upon learning that Congress did not intend for TRA '96 to have any impact whatsoever on existing and future state taxing authority, the States successfully insisted that language to this effect must be incorporated into the Act. Congress obliged by inserting the text of the state tax savings clause into TRA '96.

B. Federalism concerns—that dichotomy of power between the state and federal governments—loom especially significant in the context of state tax administration. It is axiomatic that the tax sovereignty of the States is a crucial element in preserving the balance of power between the Federal and State government within the federal system. It was recognized long ago by both the Congress and the U.S. Supreme Court that federal interference in state tax matters should be kept to a minimum, and not at all, if practicable. The reasons for this policy of non-interference was articulated by the U.S. Supreme Court over a century ago, recognizing that "[I]t is upon taxation that that several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible", *Dows v. City of Chicago*, 11 Wall. 108, 110 (1871).

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[4] *Garcia* involved a question of whether the wage and hour provisions of the Fair Labor Standards Act could be applied to state transportation workers. The Court used this case as an opportunity to revisit the question of under what circumstances a state activity is deemed immune from federal regulation. In prior cases, the Court said that state activities that constitute a "traditional governmental function" are immune from federal regulation, and listed four criteria to be met, *National League of Cities v. Usury*, 426 U.S. 833 (1976). This standard proved, however, to be completely unworkable in practice. The *Garcia* Court accordingly overruled *National League of Cities*. It is possible, however, that if *Garcia* had involved a question of the extension of federal regulatory control over state taxing authority, the result might have been different. The *Garcia* Court found "nothing...that is destructive of State sovereignty" in applying the federal overtime and minimum wage requirements to state employees. The same cannot be said of the states' revenue-raising function—it is the core attribute of a government's sovereignty, a notion the U.S. Supreme Court has acknowledged, *Oregon Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332 (1994).

The U.S. Supreme Court re-emphasized this fundamental truism in its decision *National Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. 582 (1995), declaring that it has "long recognized the principles of federalism and comity generally counsel that courts [and federal agencies with quasi-judicial powers] should adopt a hands-off approach with respect to state tax administration", 515 U.S. at 584. Indeed, since the late 19th century, Congress and the Court "have repeatedly shown an aversion to federal interference with state tax administration", *id.*, evidenced by the Tax Injunction Act (prohibiting federal courts from enjoining the collection of any state tax where a plain, speedy and efficient remedy may be had in the courts of such State), and Court decisions such as *Great Lakes Deredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) and *California v. Grace Brethren Church*, 457 U.S. 393 (1982) (prohibiting federal courts from issuing declaratory judgments regarding the constitutionality of state taxes).

## II. Discriminatory and Burdensome State and Local Taxes

The NOI also asked commentators to provide examples of what they perceive to be discriminatory and/or burdensome state and local taxes imposed on the industry. Industry responses to this question can be placed in three categories: 1) complaints that the tax treatment of telecommunications providers differs from that of other businesses (which includes the availability of exemptions, tax credits and other incentives); 2) complaints that for tax purposes, all telecommunications providers are not treated alike; 3) excessive filing burdens as compared with other kinds of multi- or single-jurisdiction businesses; and 4) the incapability of the wireless communications industry to track the progress of wireless calls so that each jurisdiction that has a taxable connection to the call will receive the appropriate tax due.

### A. Differential Tax Treatment Between the Telecommunications Industry and Other General Businesses

Several commentators (AT&T Corporation, Triton PCS Holdings, Inc., SBC Communications, Inc.) assert that the telecommunications industry is being targeted for discriminatory taxation. The Equal Protection Clause of the 14th Amendment requires States to afford all persons (or, in this case, taxpayers) subject to its jurisdiction the same treatment under state law. As interpreted by the U.S. Supreme Court, however, the mandate of the Clause permits States to create various classes of taxpayers, and to create other taxable classifications. It is within these groups that equal treatment must be administered. The Court justifies this interpretation of the Equal Protection Clause with the observation that to preserve the sovereign autonomy of the States, States must be afforded wide leeway to structure tax systems that best serve the needs of government and the citizenry.[5] This wide leeway, however, is not a license for states to act arbitrarily. The Equal Protection Clause requires tax classifications to bear a rational relationship to the

[5]Even so, states are still constrained by the Commerce, Due Process, and Privileges and Immunities Clauses of the federal constitution when creating taxpayer classifications.

goal that the state is attempting to reach. Moreover, that goal must be a legitimate one for state government, i.e., within the States' sphere of authority.[6] Discriminatory treatment is permitted only in circumstances where there exists no other alternative to reach a legitimate goal. Cases upholding discriminatory treatment under this latter circumstance are few and far between.[7]

1. Differential Treatment Is Not Discriminatory Treatment

The purpose of tax levies is to fund the services provided to taxpayers by government. A taxpayer that consumes fewer government services, for whatever reason, might be subject to less tax than one who consumes many such services. It is not unfair for a State to design a tax system intended to exact taxpayer contributions in rough proportion to the services provided and consumed. Thus, simply because a State decides to create different classes of taxpayers, create other taxable classifications, or to set differing rates of tax does not amount to discriminatory treatment between taxpayers. Not all businesses operate in the same way. Some are labor-intensive, others are capital-intensive, and still others might be neither of these. Or, a taxpayer may be subject to a particular tax structure in exchange for a particular concession, such as a grant of monopoly franchise within the taxing jurisdiction. In the property tax area, it might make more sense for States to centrally assess certain businesses (and distribute the proceeds to local government) using criteria that includes intangible property or the value of an enterprise as a going concern. While these businesses might have property in every local jurisdiction, the market value of such property may not reflect the value of the services the local government renders to the taxpayer. Property owned by railroads, landline telecommunications providers and pipelines are often assessed in this manner. For other businesses, it might make more sense to permit each local jurisdiction in which the taxpayer maintains property to make its own valuation (which also might include intangible property) and assessment, because the value of the taxpayer's property is more reflective of the value of the service rendered by government. The bottom line, however, is that States are generally obligated to value property in a uniform manner, but are permitted to employ different valuation methodologies, on a uniform basis, to arrive at the same result in determining fair market value.

Like the power to create taxpayer classifications, the states' power to grant taxpayer exemptions from an otherwise applicable tax is also a reflection of the policies that a State has chosen to pursue.[8] States grant tax exemptions to further certain policy goals that it deems desirable, not just simply because they can. Incentives, tax credits and other subsidies are employed by States and other political units—such as counties, or foreign sovereign governments—to attract businesses that they deem desirable, inducing those businesses to start up or relocate in that State. The ability of a state to grant tax exemptions in order to achieve a certain policy goal is just as important as the ability to levy a tax,

[6] *Nordlinger v. Hahn*, 505 U.S. 1 (1992)
[7] *Maine v. Thiboutot*, 448 U.S. 1 (1980)
[8] It is also a privilege granted by a State to a taxpayer, rather than an entitlement.

which has not gone unnoticed by the U.S. Supreme Court, *Department of Revenue of Oregon v. ACF Industries*, 510 U.S.332 (1994) ("[p]roperty tax exemptions are an important aspect of state and local tax policy"), p. 344. Some businesses are granted exemptions to encourage investment in air and water pollution control devices, or to encourage businesses to purchase property or relocate in economically disadvantaged areas.

It is erroneous to think that Congress, in enacting TRA '96, intended to protect the telecommunications industry from every state tax regime that treats that industry differently from other types of industries and businesses. That, in itself and without more, is simply not discrimination. The MTC does not dispute that the structure of the telecommunications industry has changed dramatically since the time when telecommunications taxes were first developed, and will continue to change in the future. It also does not dispute that State and local telecommunications tax structures should reflect the reality of how the telecommunications industry operates. However, the place to raise these issues and make the appropriate changes in the law is in the state legislature or county/city council, rather than seek federal preemption as a solution. This would not be unduly difficult—is well-known that the telecommunications industry is not altogether without influence when it comes to the legislative process, at whatever level of government.

B. Tax Treatment of Competitors Within the Telecommunications Industry

Industry comments on this issue are confusing. Many of the comments appear to, or openly assert that all telecommunications competitors should be treated alike for tax purposes, (Airtouch, SBC Communications), because they provide the same service. These commentators complain that for governments to differentiate between providers for tax purposes is discriminatory. Yet other commentators contend that because telecommunications providers do not provide service in the same manner, the different segments of the industry should be treated differently, (Triton PCS Holdings, Sprint Corporation). State and local government officials need to be "educated" about the differences in how the industry providers deliver telecommunications service to achieve competitive neutrality.

For those in the telecommunications industry who demand that all competitors should be treated alike for tax purposes, the MTC notes that the during the existence of the National Tax Association Communications and Electronic Commerce Tax Project, a Project resolution stating that there should not be differential taxation with respect to industry competitors was voted down by the business participants. Additionally, considering that the telecommunications industry appears to be divided on how it should be taxed, the FCC should not permit itself to be drawn into questions of what constitutes discrimination between providers. For one thing, the FCC does not have sufficient knowledge and expertise in the state and local tax field in order to make informed decisions regarding instances of alleged discriminatory practices. It is eminently possible that the FCC could render a decision that perhaps "cures" the perceived discrimination

suffered by a particular petitioner or group of petitioners, but creates other, unintended discrimination issues for other providers.

C. The Excessive Filing Burden

To illustrate the filing burden, all industry commentators point to a 1999 study compiled by the Committee on State Taxation that purported to demonstrate that the telecommunications industry is subject to far more filing requirements than other industries or "general businesses". Admittedly, the numbers cited by the study are impressive, in terms of the overall number of returns that industry players have to file, and the total number of different types of taxes imposed, in comparison to non-telecommunication businesses.

The MTC is not disputing COST's findings. It should be pointed out, however, that the hypothetical taxpayer profiled in the COST study presumes that one company provides all communications services—i.e., cable, long-distance, local, wireless, etc.—everywhere in the United States. However, the state and local tax structure applicable to this industry assumes that the provider of each type of communication service is a separate entity (i.e., the cable communications provider is a separate entity from the long-distance communications provider, which is a separate entity from the local communications provider, and so on). In other words, the COST study presumes a provider that is operating in a post-TRA '96 environment (where one entity is permitted to provide communication services of all types), while the extant tax structure is geared towards a pre-TRA '96 environment (when it was illegal for one entity to provide communication services of all types). Moreover, the COST study includes as part of the filing burden taxes and other fees that are not necessarily administered by the principal revenue agency of a state or local jurisdiction. Some of the taxes cited by COST might be administered by the state department of transportation, or the public utilities commission. Other taxes included in the study are not levied by state or local government at all, but are federal taxes—like the universal service fee and other federal excise taxes.

The MTC does not minimize the filing burden that the telecommunications industry has to face. The MTC agrees that the state and local tax structure for the communications industry must be simplified, and reformed to reflect the changes in the telecommunications environment. The point is that although the current tax structure for the industry is the result of a series of historical events, restructuring the system is one that is best undertaken by governments that impose the taxes. It is here that industry could be of invaluable assistance, educating state and local tax officials on the realities of how the telecommunications industry operates, and working with government to devise a tax system that does not overly burden the industry, yet does not result in an unacceptable reduction in revenue. The key is to devise a system that is fair to both industry and government; and both groups need to approach the issue with a cooperative spirit. Indeed, just days ago, the industry proposed to begin a joint project with State and local governments (with assistance from state government organizations, including the National Governor's

Association) to reform telecommunications taxation. The MTC is supportive of such a project and fully intends to participate.

D. The Tax Difficulties Peculiar to the Wireless Industry

Wireless industry commentators have made much of the difficulty in tracking the progress of wireless calls through various taxing jurisdictions that impose transaction-type taxes on airtime charges, and the inability of providers to keep up with the taxes to which they are subject in a particular taxing jurisdiction, rate changes, and the like. The providers urge the FCC to "step in and lay some ground rules for states and municipalities to follow", (Triton PCS Holdings) .The MTC does not dispute that wireless providers face difficulties peculiar to their segment of the industry. However, the MTC notes that as the result of a cooperative effort between the wireless industry and states, a partial solution to some of problems has been reached.

Nearly two years ago, the wireless industry approached state and local organizations with an idea to resolve the issue. After many months of hard negotiation and effort, government and industry created a system that sources, for transactional-type taxes, all wireless calls to one location, regardless of where such calls are actually made. Thus, a wireless phone user in North Carolina may use her cell phone in California to place a call to Oregon, but the call will be subject to tax only in North Carolina. The solution calls for States and localities to develop a database system at no cost to the industry, which, upon entering an address, will produce all of the taxing jurisdictions associated with that address, and will display all of the applicable tax rates.[9] It is incumbent on States and localities, not the wireless communications providers, to keep the database current. In exchange for using the database to collect and remit all applicable taxes, providers will be held harmless for all errors in tax remittance that occur as a result of errors in the database.

Although not appropriate to discuss here, the solution crafted by the two sectors has other features that ease the compliance and administrative burdens for industry and states alike. What is important, however, is that this solution is not simply an idea floating in the ether. Government and industry groups, supported by states, localities and players in the wireless communications industry, drafted federal legislation to implement the solution, which was introduced in both houses of Congress during the last session (S. 1722, sponsored by Sens. Dorgan (D-ND) and Brownback (R-KS) and H.R. 3489, sponsored by Rep. Pickering (R-SC). Federal action is required to implement this solution because of the limitations placed on the reach of state tax authority by the U.S. Constitution, which are only resolvable by Congress. The legislation is expected to pass

[9] The provider may develop such a database if a State or locality is unwilling to do so. As long as the provider exercises due diligence in creating and maintaining the database, she will be held harmless from database errors resulting in tax paid to the inappropriate jurisdiction.

when Congress returns from Winter Recess, and preliminary work has already begun on database design.[10]

The above amply illustrates that States and localities are perfectly capable and willing to partner with industry to find solutions to problems in tax administration and compliance without preemptions to which the States and local governments have not agreed. Because results like these are achievable, it is of utmost importance that States be allowed the opportunity to reform existing tax regimes, and to invite federal assistance only where it is needed.

E. General Observations

It is ironic to note that the purpose of the NOI, at least with respect to state and local taxation, is to gather information and document instances of unfair, discriminatory or burdensome taxation of the telecommunications industry, yet the FCC appears willing to exercise its alleged preemptive powers (even if such powers are limited in scope) at the behest of telecommunications providers who believe that a state or local tax discriminates against them. The irony stems from the fact that the exercise of such powers on behalf of one industry necessarily discriminates against taxpayers in other, unrelated industries. If a taxpayer believes that he is harmed by a state or local tax law, the taxpayer is entitled to challenge that law or its application first through the state's administrative procedures, and if no satisfaction or relief is obtained, through the state courts. Under very limited circumstances, that same taxpayer could even pursue his claim in the federal courts.[11] Invocation of the adjudicative power of the judicial system to obtain redress for alleged wrongs committed by States provide all the opportunities for relief to which taxpayers are entitled.

Under the FCC's potential interpretation of TRA '96, the same would not apply to the telecommunications industry. Here, aggrieved taxpayers have a second avenue of redress that is not available to any other taxpayer. If a telecommunications provider is not satisfied with a judgment obtained from the state or federal judiciaries, he has the further opportunity to obtain redress from the FCC, which may render a decision favorable to the taxpayer, despite the contrary results obtained in the courts. Or, the taxpayer may not even make the attempt to gain relief through the courts—he might simply proceed to the FCC with his claim. Whether an FCC decision with respect to a particular telecommunications taxpayer is favorable or unfavorable, the point is that the telecommunications industry enjoys a further opportunity for redress that non-telecommunication taxpayers do not. States, or course, may institute declaratory challenges to FCC regulations and opinions

[10] We would note that this is not the only instance of States working to streamline and simplify tax administration for industry's benefit. The States have designed a "zero-burden collection system", specifically targeted at remote vendors (especially those engaged in e-commerce) that automatically collects and remits applicable sales taxes on goods sold to purchasers without any effort on the part of the vendor.

[11] The Tax Injunction Act, 28 U.S.C. 1341, was enacted in 1937 to curb federal court interference with state tax collections. The Act deprives federal courts jurisdiction over state tax challenges unless there is no "plain, speedy and adequate relief" available at state law.

with which it does not agree, just like any other private or public entity. However, each such challenge represents myriad dollars and time spent in continued litigation on an issue that had (or should have) been judicially resolved by the states courts in the first instance.[12]

Moreover, the assumption of FCC jurisdiction and preemptive authority over state and local tax laws will serve only to illustrate the adage that "separate justice is not equal justice." If the telecommunications industry enjoys a second avenue of appeal, there is no guarantee that those appeals will be evaluated by the same standards used by state courts and the U.S. Supreme Court in applying the equal treatment and uniformity provisions of their State and federal Constitutions. It is entirely possible that the FCC might adopt rules that hold telecommunications companies to a lower standard of accountability than other taxpayers. The result is not only procedurally unfair, it may result in taxes being shifted to other state and local taxpayers who have no fair and equal remedy. In particular, the FCC might, on the basis of applying a lower standard of accountability than required by state courts for all other taxpayers, shift property tax burdens unfairly away from telecommunications companies and onto other businesses and individuals. At the same time, homeowners and other businesses, while affected by such tax rulings, may not have the ability to bring their views to the FCC's attention.

The MTC agrees that the changing telecommunications environment creates a need for State and local governments to revisit the structure and operation of laws affecting this industry—laws that date from an earlier era. However, the task of reviewing and updating such laws and practices is best left to State and local governments working with industry. The MTC recognizes that certain limited circumstances may arise in which State and local governments, and industry, working together, conclude that Congressional action may be needed to ensure the equitable, efficient and effective operation of State and local tax laws. Indeed, State and local governments and the industry have reached just such a conclusion with regard to certain aspects of wireless telecommunications taxation. On the other hand, federal intervention in State and local taxation—absent agreement among State and local government and the affected industry—is likely to be destructive instead of constructive. Such intervention raises serious constitutional issues, upsets the balance of power between the Federal government and the States and discourages cooperative efforts between State and local governments and industry to achieve necessary tax reforms. Most importantly, there is no legal authority for the Federal Communications Commission to be the vehicle for Federal intervention in this field.

[12] There is also the question of whether a taxpayer must first comply with State administrative procedures for tax disputes before invoking the quasi-judicial functions of the FCC. The answer to this question is most likely "no" (see, e.g., the provisions of the 4-R Act, 49 U.S.C. § 11503).

F. Conclusion

Neither TRA '96 nor the '34 Act contain a clear statement of intent by Congress to preempt state and local tax authority with respect to the taxation of the telecommunications industry. Without that clear statement, the FCC cannot claim a grant of congressional authority conferring jurisdiction or preemptive power over state and local tax law.

Differential tax treatment between types of businesses does not inevitably constitute unlawful discrimination. The U.S. Supreme Court has always held that States have wide leeway in establishing taxpayer classifications and taxing regimes that best suit the needs of government and the citizenry. This broad grant of authority also means that states and localities have the power and means to partner with the industry to craft a new telecommunications tax structure that better reflects the manner in which the industry actually operates.

Respectfully submitted,

Dan R. Bucks
Multistate Tax Commission
Executive Director

Roxanne Bland
Counsel
Multistate Tax Commission

# TaxNet Governmental Communications Corporation

## Minutes of Meeting September 26, 1990

Attendees
Dan Bucks, MTC
John James, Wisconsin
R. Gary Clark, Rhode Island
Harley Duncan, FTA
Paull Mines, MTC
Jonathan Lyon, FTA

Mr. Bucks opened the meeting with a discussion of the TaxNet organizational structure, and suggested that FTA may wish as a matter of due diligence to perform an independent legal review to satisfy itself on any issues relating to corporate form.

Paull Mines reviewed the memo that he had prepared covering needed matters relative to finalizing TGCC's structure. These included:

Location of incorporation
Location of operation
Appropriate entity type
Name registration
Corporate agent and address
Organization purpose(s)
Information on directors, succession, network communications expertise
Listed incorporators
Removal of directors
Date of annual meetings
Director compensation
Indemnification and insurance
Separate legal representation
Organizing meeting

John James asked about the fact that the draft documents indicated TGCC as a non-member, non-stock corporation. Paull Mines responded that this is permitted in Washington DC, the planned location of incorporation.

Mr. James indicated that no compensation for the directors is OK. He asked about liquidation/dissolution provisions. Mr. Mines said that this is up to the TGCC Directors and that the Board should define this.

The possibility of qualification of TGCC as a state's instrumentality was raised, and it was pointed out the FTA explored this at an earlier time but was turned down by the IRS due to foreign entity membership; however this could be examined further.

Possible TGCC Unrelated Business Income (UBI) issues were discussed. **Gary Clark** pointed out that as long as the organization purpose is to provide service to the states in order to reduce governmental burden on citizens and assist in tax administration, an IRS Section 501(c) 3 ruling should be possible.

Meeting was adjourned.

# TaxNet Governmental Communications Corporation

## Minutes of Meeting August 19, 1991

Attendees:
Dan Bucks, TaxExchange Managing Director
Harley Duncan, TaxExchange Assistant Managing Director
Jonathan Lyon, TaxExchange Client Administrator

Attendees (by teleconference):
Duane Benton, Missouri, Board Member
Ron Schreiner, South Dakota, Board Member
Ernie Dronenburg, California, Board Member
Debbie Basnett, Missouri

The meeting was called to order by Mr. Dronenburg.

Mr. Bucks provided an update on events relating to the development of the TaxExchange Electronic Communications Network (trade name for the service provided by the TaxNet Governmental Communications Corporation) since the previous meeting.

He focused on the negotiations over price, contract term, and connectivity through the vendor (GEIS) and said that since GEIS would not commit contractually to "connecting" all tax agencies, the Managing Directors determined that a one year rather than three year contract term was appropriate. He said that GEIS agreed but stated that previously negotiated pricing would only be available for the one year term. Mr. Duncan said that a possible GEIS motivation is that they do not wish to commit to supporting a current BusinessTalk software product which is soon to be superseded by a completely new software release, BusinessTalk 2000.

Mr. Schreiner asked whether it was felt that our side had inferred in error that GEIS was prepared to connect all state tax agencies, or that GEIS had misled us in their marketing pitch. Mr. Bucks said that it was hard to determine, but that it was clear that, at the rates negotiated, they desired to sell us the BusinessTalk software, and not commit to a package which would include personnel and system development services enabling all agencies to easily be connected to TaxExchange.

Mr. Bucks explained that a possibly compatible or alternative strategy is to explore in the near term the use of Lotus Notes, a new software package that may have many of the features needed by agencies to do business electronically with each other, including workgroup-shared database facilities and built-in data encryption. Mr. Dronenburg asked how the use of Lotus Notes could tie into the use of the GEIS network. Mr. Bucks responded that there are a number of scenarios which can be envisioned: state connections through a telephone toll call with no GEIS involvement, use of GEIS as a value-added phone company providing local access numbers, use of GEIS mainframes to "host" the Lotus Notes server, and possibly others.

It is felt at this early stage that the possibility exists to migrate to Lotus Notes from BusinessTalk. Ms. Basnett raised the potential of additional training time involved in changing software packages, and asked about whether existing BusinessTalk users will be supported following the new software upgrade to BusinessTalk 2000. Mr Lyon said that we should know more following a GEIS BusinessTalk User's Group meeting in early October.

Mr. Lyon then provided a brief explanation of the field test agreement for GEIS direct end-user billing that was included as a part of the contract signature documents.

Mr. Bucks next reviewed plans to retain an accounting firm, continue development of the sales and marketing and financial plans, and take action on legal documentary and tax filing requirements.

Mr. Schreiner then made a motion to approve the TGCC-GEIS contract, and Mr. Benton seconded the motion. A vote was taken and there was unanimous assent. Mr. Bucks then agreed to express the final contract documents to Mr. Dronenburg for his signature and return to TGCC. Mr. Bucks then closed the meeting.